IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 98645

STATE OF ARIZONA, PETITIONER

V.

WILLIAM DALE MANYPENNY, RESPONDENT

RESPONSE TO

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

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PREFATORY NOTES

The facts necessary to determine the question of jurisdiction of the Court of Appeals have been correctly recited. Since a reversal of the Court of Appeals by this court will occasion a remand for the consideration of the majority, no facts are recited dealing with the merits of Judge William C. Frey's decision. This Court is being asked solely to consider the ability of an appellate court to entertain this appeal.

Reference to the Petition for Writ of Certiorari are made by the designation "Pet." and the record of the trial court by "CR."

REASONS FOR DENYING THE WRIT

This court should not grant the petition for writ of certiorari and review this case. The Court of Appeals, Ninth Circuit, has rightly held that the State's right of appeal must be expressed by Federal statute and cannot arise by implication under Section 28, U.S.C. 1291 or by adoption under Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

The majority bases its decision of lack of jurisdiction of subject matter appeal on a principle of Federal criminal law: That there must be an expression of Congressional intent that jurisdiction exist in the Federal court. Pet. 5a et. seq. For this proposition, the Ninth Circuit relied upon two principal sources, the lack of Federal statutory appeal and the

and the designation of the "United States" only in 18 U.S.C. §3731.

United States v. Best, 573 F. 2d 1095 (CA9-1978) is best illustrative of the majority opinion. In Best the Ninth Circuit emphasized the Congressional intent to yield to state jurisdiction, and in the absence of Federal legislation creating jurisdiction, Federal entities could not extend their jurisdiction. Id. 1099. Judge Choy, speaking for the majority, fairly discussed those cases which adopted the state law in the absence of Federal statute. Pet. 7a, et. seq. United States v. Craine, 589 F. 2d 996 (CA9-1979). However, in instances of criminal jurisdiction in Federal courts, only specific statutory authority can create a right of appeal. Pet. 5a:

> It is well-settled that the prosecution has no right to appeal an adverse decision absent some statutory authority.

As has been amply demonstrated by the majority, Congress did not provide for an appeal in a removal action. Pet. 13a-14a.

Nor can the state avail itself of the statutory provisions granting the "United States" a right of appeal. 18 U.S.C. 3731. The United States is the party given the right to appeal in the Federal judicial system by Congressional mandate and not by the State of Arizona. By definition applied by Congress in numerous statutes and by the Arizona Revised Statutes, "state" and "United States" are entirely different entities. AR. S. §1-215(32); A.R.S. §1-215(34); 18 U.S.C. §43; Government of Virgin Islands v. Hamilton. 475 F. 2d 529 (CA3-1973).

If, indeed, the state law should be applied in determining the state's right of appeal, the Federal Court of Appeals in its decision could not confer upon the state any right greater than that available under the laws of the state:

> Removal gives the Federal court only derivative jurisdiction. This is no better than that possessed by the state court in which the action was commenced. Thus, if jurisdiction is lacking in the state court in the first instance, it is not brought into being by removal, even though the Federal court to which the suit was removed would have had jurisdiction had the action originated there. Kappens Co. v. Continental Casualty Co., 337 F. 2d 499, 501-502 (CA8-1964) (Emphasis added).

The state law provides no right of appeal from a judgment of acquittal entered by the Court and no right should be conferred upon the

state by the appeals court or by this court. Only the right of appeal from judgment of conviction is conferred upon the defendent: "An appeal may be taken by the defendant only from: 1. A final judgment of conviction." A.R.S. 13-1713.

There is no provision for an appeal by the state from a judgment of acquittal and the recognition of the right in the defendant amply demonstrates that the state legislature fully distinguished a "judgment" from an "order." Judge Kennedy's pronouncement in his dissent (Pet. 38a) that the words "judgment" and "order" are used interchangeably in the statutes is totally without basis. Such a construction by the dissent accomplishes nothing, since a state's appeal right is "An order made after

judgment affecting the substantial rights of the state." A.R.S. 13-1712 (5). There is no judgment after judgment or order after judgment in the present case to be appealed.

Without exception the courts of Arizona have held that in the absence of an appellate right conferred by statute, the courts would not create one:

> ...the only right of appeal granted to either party in criminal cases is that extended by A.R.S. Section 13-1711...
>
> ...
>
> The provisions of Section 17-1712 limit this right of appeal to certain specified orders and rulings. State v. White, 27 Ariz. App. 213, 553 p. 2d 246, 247-278 (1976)

Even more emphatically, the Arizona Supreme Court has stated the rule applied in state court:

> The right of appeal in criminal cases was unknown to the common law...It is purely statutory and does not exist in absence of statute...There is no provision either in Arizona's Constitution, by statute or criminal rule which permits an appeal to the Superior Court or to this Court from a denial of a Motion to Dismiss a Criminal Complaint. State v. Whitney, 108 Ariz. 277, 496 p. 2d 139 (1972). See also State v. Gasonette, 95 Ariz. 234, 388 p. 2d 809 (1964).

Judge Kennedy in his dissent and the prosecution in its petition dwell long and emotionally on the principles of federalism. Pet. pp. 25-27, 16a-17a. Yet, there appears no statutory citation of authority for the filing of an appeal in state court from a judgment of acquittal. The interests of federalism are not promoted by conferring upon the state prosecution a right of

appeal not recognized by its own legislature and thus placing a substantial burden upon any Federal officer seeking to remove his case to the Federal judicial system. The removal statutes were not intended to subordinate the principles of statutory review to the exigencies of judicial preference. The removal statutes have served an historically vital part in the divisions of the two sovereigns and the practical inhibition suggested by the court is unacceptable.

The dissent and the prosecution would justify an appeal by the State under the provisions of 28 U.S.C. §1291. Pet. 24 & 25; 21a and 22a. The language of 28 U.S.C. §1291 nowhere gives express authority to the state to appeal. The cases construing the United States criminal appellate remedies demonstrate the

concern that the right of the prosecution to appeal is unequivocally derived from express statutory authority.

> The government is initially faced with "the concept that in the Federal jurisdiction*** appeals by the government in criminal cases are something unusual, exceptional, not favored." Carroll v. United States, 354 U.S. 394, 400, 77 S. Ct. 1332, 1336, 1 L. Ed 2d 1442 (1957). Indeed, the United States is denied the right of appeal in criminal cases absent express statutory sanction. There is no express authorization in 28 U.S.C. §1291 and the government's only statutory created right of appeal in criminal cases is given by 18 U.S.C. §3731. United States v. Hines, 419 F. 2d 173 (CA10-1970) (Footnotes omitted) CF. United States v. Wilson, 420 U.S. 332 (1975)

A statute which can not serve as a vehicle for appeal for the United States should not be used to permit a state appeal, particularly, when such an appeal is denied by the state of origin.

As is pointed out in the majority opinion in the Order granting Rehearing (Pet. 12a & 13a), the legislative history supports the view that Congress never intended that the rights afforded the United States could by implication confer a right upon the several states. The argument of the dissent that in the absence of express authority to the contrary the right should be assumed is in opposition to all state and federal law. Pet. 16a. United States v. Wilson, 420 U.S. 332, 336 (1975).

The argument that the state may appeal under 28 U.S.C. 1291 while the United States must have express statutory authority, ignores the express prohibition against such activity by the Arizona Courts. State v. Hunt, 8 Ariz. App. 514, 477 p. 2d 896, 904. State v. Hunt, supra, held that even when the defendant had appealed, no right of cross appeal existed challenging a judgment of acquittal entered by the trial court. Id. This Court should not entertain a review of a judgment wholly beyond the purview of state and federal appellate jurisdictions. The lack of Congressional consideration should not be the signal for a judicial expansion of federal statutory law. Pet. 8a-9a.

The cases cited by the dissent for the proposition that the State has a right of review

are inapposite. State ex rel Dawson v. Superior Court, 112 Ariz. 123, 538 P. 2d 397 (1975) involves the trial court enforcing a time limit in ruling upon a motion for judgment of acquittal under the provisions of Rule 20, Arizona Rules of Criminal Procedure which prohibits the court from taking under advisement (reserving) a decision on defendant's motions. The trial court had reserved a decision on the motions in clear contravention of the rule. The review by the court was not of the merits but of contravening the time limitations.

State v. Allen, 27 Ariz. App. 377, 557 P. 2d 176 (1976) does not decide the question of jurisdiction of the court to consider the propriety of the Court of Appeals of Arizona's review of a judgment of acquittal. The trial

court had entered a judgment of conviction and sentence on remand from a special action. Id. 177. The right of the state to appeal the action is nowhere discussed in the opinion cited by the defense but is amply provided by statute as:

> A.R.S. 13-1712
>
> An appeal may be taken by the state from:
>
> 5. An order made after judgment affecting the substantial rights of the state. (Emphasis added)

There is no showing that the jurisdiction special action which preceded the appeal was tested and the Court may well have assumed jurisdiction. The basis could well have been that the trial court took the initial motion for

judgment of acquittal under advisement. Dawson v. Superior Court, supra.

The provisions for a special action (previously writs of mandamus, etc.) are not a substitute for appeal. The standards set forth for the special actions are now formalized in a written rule, in pertinent part as follows:

> The only questions that may be raised in a special action are:
> ***
> (c) Whether a determination was arbitrary or capricious or an abuse of discretion.
> Rules of Procedures for Special Action, Rule 3.

The special actions are conceived in the rules as embracing the extraordinary writs as previously set forth by statute (A.R.S. 12-2001 et. seq.) and are limited:

> ...nothing in these rules shall be construed as enlarging the

> scope of the relief traditionally granted under the writs of certiorari, mandamus and prohibition. Rules of Procedure for Special Actions. Rule 1(a)

The traditional role of the examination of abuse of discretion in the extraordinary writs is strictly limited and does not embrace an appellate review of the facts or the correctness of a decision:

> "The general rule is that if the action of a public officer is discretionary that discretion may not be controlled by mandamus. The rule, however, is qualified by the provision that if it clearly appears that the officer has acted arbitrarily and unjustly and in abuse of discretion, the action may still be brought." Peters v. Frye, 223 P. 2d 176, 180, Ariz. (1950). (Emphasis added)

And what the nature of that abuse must be is described later in the opinion:

> "Yet, if the case presented is one where the decision has been in such flat opposition to the facts as to force the conclusion that the decision was in bad faith, a review by the courts will always be open to the aggrieved party..." Id. 180. Specifically on writs of certiorari see Duncan v. Truman, 248 P. 2d 879 (1953).

If there then is a right of review by certiorari or other extraordinary writ, then, the record does not support the conclusion that Judge Frey's actions in the Court below constituted actions tantamount to "bad faith." Nowhere does the dissent draw such a conclusion.

The dissent does not contend that such abuse exists, only that "...I think the evidence introduced at the first trial may have permitted a reasonable inference that the defendant was not executing his duties in good faith." Pet. 32a.

(Emphasis added). This does not remotely approach the standards of "bad faith" enunciated by the Arizona appellate courts. Peters v. Frye, supra. This Court should approach this question carefully lest a new method of review be imposed upon the state contrary to its concepts of extraordinary relief.

Assuming an appeal or other review is available, this Court must address the question of jeopardy under the 5th Amendment to the Constitution. There is probably no area currently more confused, whether on the state or federal level. Nor has this writer found any Supreme Court decisions directly applicable to the present case. This Court has held alternatively that (1) the constitutional significance of double jeopardy should not depend upon the

timing of the motion, United States v. Martin Linen Supply Co., 430 U.S. 564, 574 (1977) and (2) the point at which the judgment of acquittal under Rule 29 is entered, i.e., before or after verdict is vital to the issue of jeopardy United States v. Scott, 437 U.S. 82 (1978).

These two cases are illustrative of the lines drawn by the opposing views of this Court and we would respectfully submit that the artificial strictness of chronology should not govern this Court but, rather, the function of the Court in Rule 29 be exercised as conceived by Congress. The question should be: Does the decision of the trial court reach the sufficiency of the evidence or is the ruling upon a legal impediment. This Court in United States v. Martin Linen Supply Co., supra, rejected the

artificial determinative of time:

> ...Rule 29 contemplated no such artificial distinctions. Rather the differentiations in timing were intentionally incorporated into the Rule to afford a trial judge the maximum opportunity to consider with care a pending acquittal motion. Id. 574.

This Court need not and should not reach this question. The conflict in the Court on the question of jeopardy is apparent in United States v. Scott, supra, and companion cases. See dissent of Justice Brennan, Id. 101, et. seq.

Finally, the dissent has held that the question of immunity was not raised until the time of the states hearing on the district court's rehearing of the Motion in Arrest of Judgment. Pet. 31a. If the dissent intends this statement to act as a criticism for

failure to use the word "immunity" then such rebuke is warranted. However, if the dissent intends the statement as a failure to raise the intrinsic and substantive issues attendant to the label of "immunity," such a conclusion is totally unsupported in the record.

The issue of the inability of the state to interfere with the acts of a federal officer in the performance of his duties on a federal reservation was raised in the Motion to Dismiss prior to trial (CR 73 & 78) and in all pleadings and oral motions, including the Motion in Arrest of Judgment, subsequent to the first motion, defendant sought relief on this basis.

The issue was raised prior to trial if the state has the right to try a federal officer

The principal case relied upon as being most appropos was Brown v. Cain, 56 F. Supp 56 (D.C. Pa - 1944), which holds after the discussion of immunity (Id. 58-59):

> I have no doubt that a guard in the service of the United States, protecting the plant of a vital war industry, who, in the performance of his duty, does an act for which the state authorities propose to prosecute him, should be held amenable to the law of the United States and to no other. Id. 60. CR 73, 78.

That the shibboleth of "immunity" was not incanted is admitted. That the issue of immunity and the federal government's supremacy in this field of immigration was raised is strongly supported by the record.

CONCLUSION

Unavoidably, the foregoing argument has been directed both at the points raised by the state and by Kennedy, J., in his dissent.

The issue of appellate jurisdiction has been an issue since the outset of appeal. The question was first raised by the defendant in a motion prior to the filing of briefs. The state chose to stand on its right of appeal while its brief at this late date speaks to the conversion of the proceeding from an appeal to a writ. The cases cited for this proposition demand a standard of "gross abuse of discretion" (Pet. 45) for federal review and an abuse of discretion amounting to "bad faith" in the state arena. Neither the state nor Judge Kennedy has addressed this quantum of abuse and this court should not entertain it.

If the case were in a similar posture in the state judicial system, the courts would no doubt hold that such a proceeding (special action) had ever been waived by inaction. Deddens v. Cochise County, 113 Ariz. 75, 546 P. 2d 811 (1976). Surely, a similar condition exists in the federal system after two years in the Court of Appeals.

The granting of a writ of certiorari will only serve to evade a clear principle of the statutory requirement for criminal appellate review. Further, it will burden the federal officer within the meaning of 28 U.S.C. §1442 with unacceptable risks in the exercise of his statutory right of removal.

On the bases set forth above and others cited in the body of this brief, Defendant/

Respondent respectfully submits that certiorari should be denied.

Respectfully submitted this 7th day of December 1979.

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Respondent